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The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN DOE, et al.,

CASE NO. C17-0178JLR

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

JEWISH FAMILY SERVICES, et al.,

CASE NO. C17-1707JLR

Plaintiffs,

v.

DONALD TRUMP, et al.,

Defendants.

(RELATING TO CASE NO. C17-0178JLR)

**DOE PLAINTIFFS' SURREPLY TO DEFENDANTS' MOTION TO DISMISS
AND DISSOLVE PRELIMINARY INJUNCTION AS MOOT**

DOE PLS.' SURREPLY TO
DEFS.' MOT. TO DISMISS
AND DISSOLVE PRELIM. INJ.
AS MOOT
(2:17-cv-00178-JLR)

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1 Doe Plaintiffs file this Surreply respectfully requesting the Court strike the argument
2 raised in Section IV of Defendants' Reply in Support of Motion to Dismiss and Dissolve
3 Preliminary Injunction as Moot ("Defendants' Reply") at 16-17, Dkt. # 150.

4 Defendants' Reply includes an entire section in the argument portion of their brief
5 entitled "The President of the United States Should be Dismissed as a Named Defendant." *Id.*
6 Yet, there was no section in Defendants' original Motion raising this issue. *Compare* Table of
7 Contents of Defs.' Mot. to Dismiss and Dissolve Prelim. Inj. as Moot ("Motion") at ii, Dkt. #
8 145, *with* Table of Contents of Defendants' Reply at ii. The only mention of the possibility of
9 dismissing President Trump as a defendant is in footnote 4 of the Motion at the end of the
10 conclusion of their brief. Motion at 14 n.4.

11 It is well settled that "[courts] review only issues which are argued specifically and
12 distinctly in a party's opening brief. . . . [A] bare assertion does not preserve a claim."
13 *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). Raising an issue in a footnote clearly does
14 not suffice and results in the waiver of the claim. *See, e.g., Recycle for Change v. City of*
15 *Oakland*, 856 F.3d 666, 673 (9th Cir.), *cert. denied*, 138 S. Ct. 557 (2017) (finding argument
16 waived because it was not raised in the brief other than in a footnote); *City of Emeryville v.*
17 *Robinson*, 621 F.3d 1251, 1262 n.10 (9th Cir. 2010) (holding that "[b]y failing to address the
18 issue in its opening brief except in a footnote," party waived its claim); *Acosta-Huerta v. Estelle*,
19 7 F.3d 139, 144 (9th Cir. 1992) (contentions raised only in a footnote in an opening brief are
20 deemed abandoned). The Ninth Circuit has held that issues which are not argued specifically and
21 distinctly in a party's opening brief, especially where a host of other issues are raised, will not be
22 reviewed. *City of Emeryville*, 621 F.3d at 1262 n.10 (citing *Greenwood*, 28 F.3d. at 977).

23 Defendants raised a host of other issues in their Motion but failed to properly raise the
24 issue of whether President Trump should be dismissed as a defendant. Having failed to properly
25 raise the issue at the outset, Defendants cannot now raise this argument for the first time in their
26

DOE PLS.' SURREPLY TO
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AS MOOT - 1
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1 Reply. *Tile Tech, Inc. v. Appian Way Sales, Inc.*, No. C17-1660JLR, 2018 WL 2113958, at *4
2 (W.D. Wash. May 8, 2018) (citing *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *see also*
3 *United States v. Puerta*, 982 F.2d 1297, 1300 n.1 (9th Cir. 1992) (“New arguments may not be
4 introduced in a reply brief.”). Pursuant to LCR 7(e)(3), Defendants had twenty-four pages for
5 their Motion but used only fourteen of those pages. Defendants had ample additional room in
6 their Motion to fully address this issue but they chose not to raise it as an actual argument,
7 instead including it as a mere aside in a footnote at the end of their conclusion. They should not
8 now be allowed to insert an entire section in their Reply for the first time.

9 For the reasons stated in this Surreply, Plaintiffs request the Court strike Section IV of
10 Defendants’ Reply in its entirety.

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DOE PLS.’ SURREPLY TO
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1 DATED this 3rd day of July, 2018.

2
3 KELLER ROHRBACK L.L.P.

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5 AMERICAN CIVIL LIBERTIES UNION
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8 /s/ Lisa Nowlin

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31 DOE PLS.' SURREPLY TO
32 DEF.' MOT. TO DISMISS
33 AND DISSOLVE PRELIM. INJ.
34 AS MOOT - 3
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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2018, I electronically filed the attached document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses on the Court's Electronic Mail Notice List.

DATED this 3rd day of July, 2018.

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